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E.O. 12958: N/A

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SUBJECT: IPR FILESHARING APPEAL: RIGHTS-HOLDERS LOST A BATTLE BUT WINNING THE WAR

REF: A. OTTAWA 1168 (CANADIAN RESPONSE TO GOC'S PROPOSED

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[1](#)B. OTTAWA 1305 (CANADA'S RESPONSE TO 2005 SPECIAL 301 REPORT)

[1](#)1. (SBU) Summary: The Canadian Recording Industry Association (CRIA) is claiming a victory in an Appeals Court's rejection of last year's decision by Judge von Finkenstein that filesharing does not constitute infringement. CRIA and the other rights-holding plaintiffs (the largest musical providers in Canada, who collectively own Canadian copyrights in more than 80 percent of the sound recordings sold in Canada) plan to again seek the names of filesharers, and the appeals decision includes a ringing endorsement of the importance of intellectual property rights (IPR). Embassy rights-holder contacts are encouraged, both by the "trashing" of Judge von Finkenstein's earlier decision and by the court's guidance on future efforts to obtain the names of filesharers. End Summary.

[1](#)2. (SBU) Background: Motions Court Judge von Finckenstein's decision last year in the case in which CRIA sought the names of filesharers that "downloading a song for personal use does not amount to infringement" shocked the IPR community. Judge von Finckenstein added that "...the exclusive right to make available is included in the World Intellectual Property Organization Performances and Phonograms Treaty...however that treaty has not yet been implemented in Canada and therefore does not form part of Canadian copyright law." This apparent loophole which would seem to make peer-to-peer filesharing legal in Canada threatened to make Canada a piracy haven and added urgency to industry calls for implementation of the already-signed WIPO treaties. The government has said that it will present legislation amending the Canadian Copyright Act (ref Ottawa 1168), however this legislation has not yet been drafted. In the absence of legislation implementing WIPO, CRIA and others decided to appeal Judge von Finkenstein's decision and attempt to require ISPs to provide the names of filesharers so that rights-holders can sue to stop infringement.

[1](#)3. (SBU) The Appeals Court decision upheld the original court's refusal to order ISPs to provide the names of infringers to the plaintiffs because the Appeals Judge found that the evidence against the unknown infringers was technically inadequate: among other things, key affidavits had been signed by the wrong person. However, the court dismissed the appeal "without prejudice to the plaintiffs' right to commence a further application for disclosure", and the plaintiffs are already planning their next attempt to obtain names of filesharers.

[1](#)4. (U) On the more important and far-reaching question of whether filesharing constitutes infringement, the rights-holders consider the decision to be an unalloyed success. The appeals judge explicitly refuted Judge von Finkenstein's statements on filesharing and concluded that "...if this case proceeds further, it should be done on the basis that no findings to date on the issue of infringement have been made."

[1](#)5. (U) Finally, in a development which bodes well for IPR rights-holders in Canada, the Appeals decision included a ringing endorsement of the principle of intellectual property rights. The judge stated: "Copyright law provides incentives for innovators--artists, musicians, inventors, writers, performers and marketers--to create...Individuals need to be encouraged to develop their own talents and personal expression of artistic ideas, including music. If they are robbed of the fruits of their efforts, their incentive to express their ideas in tangible form is diminished." Addressing the issue of IPR in the internet age, the judge stated, "...technology must not be allowed to obliterate those personal property rights which society deemed important. Although privacy concerns must also be considered...they must yield to public concerns for the protection of intellectual property rights in situations where infringement threatens to erode those rights."

16. (SBU) Post has seen CRIA's initial in-house assessment of the decision, which is enthusiastically positive. Post will continue to press for progress on IPR, following CRIA's subsequent court actions and encouraging action on legislation. One potential hurdle to legislation (the possibility of elections following a no-confidence vote) has been delayed if not eliminated, and Post will use the Special 301 out of cycle review as well as the SPP as ways to engage the Canadian government on IPR issues (ref Ottawa 1305).

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